UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FATTE ALBERTS, *a California partnership,* Plaintiff, v. PIZZAMAN'S PAVILION and MICHAEL JENSEN, Defendants.	No. 1:20-cv-00238-DAD-SKO ORDER DENYING DEFENDANT JENSEN'S MOTION TO DISMISS (Doc. No. 20)

This matter is before the court on the motion to dismiss this action for lack of subject matter jurisdiction filed by *pro se* defendant Michael Jensen. (Doc. No. 20.) Pursuant to General Order No. 617 addressing the public health emergency posed by the COVID-19 pandemic and the outbreak of the virus within this district, defendant Jensen's motion was taken under submission on the papers. (Doc. No. 23.) For the reasons set forth below, his motion to dismiss will be denied.

BACKGROUND

Plaintiff Fatte Alberts' first amended complaint ("FAC") alleges as follows. Plaintiff is a partnership based in Hanford, California. (Doc. No. 19 ("FAC") at ¶¶ 3, 6.) Defendant Jensen is an Arizona resident who owns and operates defendant Pizzaman's Pavilion, which is an

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unincorporated business entity located in Mohave Valley, Arizona that designs and builds custom trailers. (*Id.* at ¶¶ 4, 5, 7.)

In November 2018, the parties entered into a contract wherein defendant Jensen agreed to design and build "a custom-built mobile wood-fired pizza trailer" ("the trailer") for plaintiff. (*Id.* at ¶¶ 8–9.) Plaintiff intended to use the trailer for its business during the catering season, which begins in May of each year. (*Id.* at ¶ 11.) The contract required plaintiff to pay $40,000.00 for the trailer and an additional final payment at the time the trailer was picked up in the form of plaintiff giving defendant Jensen possession of a different trailer that plaintiff owned called the "Pizza Pup" trailer. (*Id.* at ¶ 9.) Pursuant to the parties' contract, plaintiff made twelve payments totaling $37,570.00 to defendant Jensen. (*Id.* at ¶ 9, 10.) Plaintiff also shipped fryer equipment valued at $4,000.00 to defendant to be installed into the trailer. (*Id.* at ¶ 13.) Defendant Jensen represented to plaintiff that the trailer would be completed by May 2, 2019. (*Id.* at ¶ 12–14.) As of February 14, 2020, the date plaintiff commenced this action, the trailer had still not been completed by defendants. (*Id.* at ¶ 16.) Plaintiff alleges that as a result of defendant Jensen's failure to procure the trailer in time for plaintiff's catering season, plaintiff "suffered lost profits . . . totaling approximately fifty-eight thousand, five hundred and fifty dollars ($58,550.00)," and provides a list of over forty events between May 2019 and October 2019 that it was unable to cater, as well as the amount of its lost profits from each event "[b]ased on prior sales history." (*Id.* at ¶ 17.) In its FAC, plaintiff asserts claims for fraud, breach of contract, and a common count for money had and received. (*Id.* at 5–7.)

On August 13, 2020, defendant Jensen, proceeding *pro se*, filed the pending motion to dismiss this action due to lack of subject matter jurisdiction.[1] (Doc. No. 20.) Therein, defendant Jensen primarily argues that the amount in controversy in this action does not exceed $75,000.00, and he also appears to request that this case be heard in the "proper court of jurisdiction," arguing that a court in Arizona "will have better ac[c]ess to witnesses and justice can be reached in

[1] The pending motion is not brought on behalf of defendant Pizzaman's Pavilion. (*See* Doc. No. 20.) The court notes that although defendant Pizzaman's Pavilion appears on the docket as representing itself, this entry on the docket is in error. In keeping with federal law, Local Rule 183 provides that "[a] corporation or other entity may appear only by an attorney."

Arizona." (*Id.* at 1–2.) The court will *sua sponte* construe defendant's argument in this regard as a motion to change venue pursuant to 28 U.S.C. § 1404(a). *See Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) ("The Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants.") (citing *Boag v. MacDougall*, 454 U.S. 364, 365 (1982)).

On September 1, 2020, plaintiff filed its opposition to the pending motion, and on September 14, 2020, defendant Jensen filed his reply thereto. (Doc. Nos. 26, 27.)

LEGAL STANDARDS

"When a defendant moves to dismiss a complaint or claim for lack of subject matter jurisdiction, the plaintiff bears the burden of proving that the court has jurisdiction to decide the claim." *Cannon v. Harco Nat'l Ins. Co.*, No. 09-cv-00026-MMA-JMA, 2009 WL 10725673, at *2 (S.D. Cal. July 16, 2009) (citing *Thornhill Publ'n Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)).

A motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) "may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." (*Id.*) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). "The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): [a]ccepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). As is true in evaluating a Rule 12(b)(6) motion, the court need not assume the truth of legal conclusions cast in the form of factual allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. Notably, courts may consider extrinsic evidence when evaluating factual attacks and the court may review "*any* evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of

jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (emphasis added) (citing *Land v. Dollar*, 330 U.S. 731 (1947)).

Pursuant to 28 U.S.C. § 1332, where, as here, the parties in an action are citizens of different states, "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." "When a plaintiff files suit in federal court, [courts] use the 'legal certainty' test to determine whether the complaint meets § 1332(a)'s amount in controversy requirement." *Naffe v. Frey*, 789 F.3d 1030, 1039 (9th Cir. 2015). Under this test, "[t]he sum claimed by the plaintiff controls so long as the claim is made in good faith." *Crum v. Circus Enters*, 231 F.3d 1129, 1131 (9th Cir. 2000); *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) ("The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith."). As the Ninth Circuit has explained in this regard,

> the legal certainty test makes it very difficult to secure a dismissal of a case on the ground that it does not appear to satisfy the jurisdictional amount requirement. Only three situations clearly meet the legal certainty standard: 1) when the terms of a contract limit the plaintiff's possible recovery; 2) when a specific rule of law or measure of damages limits the amount of damages recoverable; and 3) when independent facts show that the amount of damages was claimed merely to obtain federal court jurisdiction.

Naffe, 789 F.3d at 1040 (internal quotation marks and citations omitted). The amount in controversy "includes claims for general and special damages (excluding costs and interests), attorneys fees if recoverable by statute or contract, and punitive damages, if recoverable as a matter of law." *Pulera v. F & B, Inc.*, No. 2:08-cv-00275-MCE-DAD, 2008 WL 3863489, at *2 (E.D. Cal. Aug. 19, 2008).

DISCUSSION

A. Amount in Controversy

Plaintiff contends that the amount in controversy alleged in its FAC exceeds the jurisdictional threshold of $75,000.00. Specifically, plaintiff alleges that the twelve payments it made to defendant Jensen in the total amount of $37,570.00, plus the value of the fryers plaintiff

shipped to defendant Jensen in the amount of $4,000.00, plus the "significant amount of business opportunity" it lost "in being unable to utilize the Trailer during [its] catering season," which totaled $58,550.00, added together exceed $75,000.00. (FAC at ¶¶ 17, 18.)

In the pending motion, defendant Jensen contends that the amount in controversy in this action does not exceed $75,000.00 because: (1) actual damages "are under $35,000, on either side"; (2) plaintiff did not lose any profits because it "still had use of the trailer meant for trade," the Pizza Pup trailer; (3) plaintiff only completed "50% or so of the payments with a balance of $23,800"; (4) "[t]he evidence will show that the Plaintiff worked the events listed" in the FAC and therefore "has not suffered a loss of $58,000"; (5) "the ev[i]dence will also show industry standard on profits are clearly exag[g]erated by the Plaintiff." (Doc. No. 20 at 1.) Defendant Jensen has attached to his motion an email correspondence, a press release, and other documents which purportedly demonstrate that plaintiff's allegations with respect to its lost profits are not true. (*See id.* at 3–8.)

With respect to defendant Jensen's contention that the number of payments plaintiff made pursuant to the parties' contractual agreement is less than what it has alleged in its FAC (Doc. No. 20 at 1), he offers no evidence or corroboration for his claim in this regard. As noted above, at this juncture, the court accepts plaintiff's allegations with respect to the amount in controversy so long as they appear to be alleged in good faith. Here, the court finds that plaintiff has made its allegations regarding its payments to defendants in good faith. In the absence of evidence suggesting otherwise, the court is not persuaded by defendant Jensen's contention in this regard.

The court is similarly not persuaded by defendant Jensen's contention that plaintiff did not lose any profits because it still had use of the Pizza Pup trailer. In its opposition to the pending motion, plaintiff does not explicitly address defendant Jensen's argument in this regard or assert that it did not in fact use the Pizza Pup trailer. Although plaintiff's allegations imply that it did not transfer possession of the Pizza Pup trailer to defendant Jensen (because the transfer was to occur at the time the new trailer was picked up and that trailer was allegedly never completed by defendant), it does not necessarily follow that plaintiff was still using the Pizza Pup trailer. Moreover, even if plaintiff was still using the Pizza Pup, that does not necessarily mean that

plaintiff did not lose profits as a result of not having the new trailer it had contracted for instead of the Pizza Pup. In the absence of any evidence that plaintiff was still using the Pizza Pup trailer and that because of that use it was not losing profits during the relevant time period, the court must accept plaintiff's allegations with respect to the amount in controversy so long as they appear to be alleged in good faith. Here, again, the court finds that plaintiff's allegations regarding lost profits have been made in good faith.

With respect to defendant Jensen contention that the "evidence" demonstrates that plaintiff did not lose profits in the amount it is claiming in the FAC, his reliance on the documents he has attached to the pending motion is unavailing. As an initial matter, the documents are not properly authenticated because defendant Jensen did not provide a declaration or otherwise attest to their authenticity. *See* Fed. R. Evid. 901 (Authenticating or Identifying Evidence). Nonetheless, even if the court were to consider the documents in light of defendant Jensen's *pro se* status, the attached documents do not establish that the amount in controversy in this action is less than $75,000.00. The first document appears to be email correspondence between non-parties and in no way calls into question plaintiff's allegations with respect to the lost profits it experienced. (*See* Doc. No. 20 at 3.) The next document is a press release that notes that Main Street Hanford's Thursday Night Market Place was cancelled for the week of August 15, 2019, an event that plaintiff alleges it was unable to cater for due to defendant Jensen not procuring the trailer in time. (*Id.* at 3.) Even assuming that the event in question was cancelled, plaintiff only alleges lost profits of $600.00 from that event (*see* FAC at ¶ 17). Thus, removing that amount of lost profits from the alleged $58,550.00 total in lost profits results in a new total of $57,950.00, which when added to the value of the fryer equipment and the twelve payments plaintiff alleges it made to defendant Jensen, in total still exceeds $75,000.00. Next, defendant Jensen relies on two documents which purportedly demonstrate that plaintiff claims it was unable to cater two events on October 12, 2019 that occurred at the same time. (*See* Doc. No. 20 at 6–7.) A closer review of those documents, however, reveals that the first event took place from 10:00 a.m. to 4:00 p.m., whereas the second event began at 5:00 p.m. and ended at 10:00 p.m. (*See id.*) Thus, the document attached to defendant's motion does not suggest that plaintiff would have been unable

to cater both events on that date. Finally, defendant Jensen relies on what appears to be an article regarding food trucks in support of his argument. (*See id.* at 8.) That article asks questions like "How Much do Food Trucks Make a Year?" Defendant Jensen's reliance on this document is also clearly unavailing. Setting aside that defendant Jensen does not explain how the article in any way calls into question plaintiff's allegations with respect to its lost profits, the fact that the average food truck makes a certain amount of profit does not mean that plaintiff did not suffer the losses it is alleging in the FAC.

Accordingly, viewing the allegations in its FAC in the light most favorable to plaintiff, as it must, the court concludes that plaintiffs has sufficiently alleged that the value of its claims in this action exceeds $75,000.00. Therefore, the court will deny defendant Jensen's motion to dismiss this action for lack of subject matter jurisdiction.

B. Motion to Change Venue

The court next addresses what it has construed as defendant Jensen's motion to change venue.

Pursuant to 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought" for the convenience of parties and witnesses and in the interest of justice. "[T]he purpose of [§ 1404(a)] is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal quotation marks and citation omitted). "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622). District courts employ a two-step analysis when determining whether to transfer an action. *Robert Bosch Healthcare Sys., Inc. v. Cardiocom, LLC*, No. 14-cv-1575-EMC, 2014 WL 2702894, at *3 (N.D. Cal. June 13, 2014). "A court must first consider the threshold question of whether the case could have been brought in the forum to which the moving party seeks to transfer the case." *Park v. Dole Fresh Vegetables*, Inc., 964 F. Supp. 2d 1088, 1093 (N.D. Cal. 2013); *see also Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414

(9th Cir. 1985) ("In determining whether an action 'might have been brought' in a district, the court looks to whether the action initially could have been commenced in that district."). "Once the party seeking transfer has made this showing, district courts have discretion to consider motions to change venue based on an 'individualized, case-by-case consideration of convenience and fairness.'" *Park*, 964 F. Supp. 2d at 1093 (quoting *Stewart Org.*, 487 U.S. at 29).

As an initial matter, the court concludes that defendant Jensen's motion to change venue does not establish that this action could have been brought in the forum to which he is seeking to transfer the case. This conclusion is based in large part on the fact that defendant Jensen does not explain which forum he wishes to transfer this case to, or even what he means by "an Arizona Court." *See Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979) ("The burden is on the moving party to show that transfer is appropriate.").

However, even if the court were to proceed to step two of the analysis, the court would find that defendant Jensen has not met his burden to show that transfer is appropriate here. Defendant Jensen argues that a court in Arizona is "the proper court of jurisdiction" because "[a]n Arizona Court will have better access to witnesses and justice can be reached in Arizona," (Doc. No. 20 at 2), but is not clear what witnesses he is referring to, much less why this court would not have access to the same witnesses if need be. *See Williams v. WinCo Foods, LLC*, No. 2:12-cv-02690-KJM-EFB, 2013 WL 211246, at *4 (E.D. Cal. Jan. 10, 2013) ("To demonstrate inconvenience to witnesses, the moving party should produce information regarding the identity and location of the witnesses, the content of their testimony, and why such testimony is relevant to the action."); *Hawkins v. Gerber Prods. Co.*, 924 F. Supp. 2d 1208, 1214–15 (S.D. Cal. 2013) (the ease of access to evidence is "is not a predominate concern in deciding venue as advances in technology have made it easy for documents to be transferred to different locations"). Defendant Jensen also asserts that the contract in question was originated in Arizona, that he resides and does business there, that the trailer is currently being built there, and that all payments were deposited and transferred to a bank account in Arizona. (*Id.* at 1.) Defendant Jensen does not, however, explain why any of these alleged facts mean that litigating this action in Arizona would prevent the waste of time, energy and money or protect litigants, witnesses and the public against

unnecessary inconvenience and expense. Moreover, plaintiff sued defendants in the Eastern District of California, presumably for its own convenience given that it is located within the boundaries of this district and conducts its catering business in California. In general, courts considering motions for change of venue give significant deference to a plaintiff's choice of forum. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *see also Byler v. Deluxe Corp.*, No. 16-cv-493-AJB-JLB, 2016 WL 8669404, at *13–14 (S.D. Cal. Aug. 18, 2016).

Accordingly, the court will deny defendant Jensen's motion to change venue.

CONCLUSION

For all of the reasons set forth above, defendant Jensen's motion to dismiss this action for lack of subject matter jurisdiction and, alternatively, to change venue (Doc. No. 20) is denied.

IT IS SO ORDERED.

Dated: **October 30, 2020**

Dale A. Drozd
UNITED STATES DISTRICT JUDGE